IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL REV.APPLICATION NO.37 OF 1998

Sayyad Madar Shaikh .. Applicant
Versus
State of Maharashtra .. Respondent

Mr.Nitin Jamdar for applicant
Mr.S.S.Pednekar, APP for State

CORAM : S.C.DHARMADHIKARI, J.
DATE : 10th November 2006.

ORAL JUDGEMENT:-

. This Criminal Revision Application is directed against the judgement and order of the Sessions Court, Solapur in Criminal Appeal No.18 of 1995 which confirms the judgement in Regular Criminal Case No.38 of 1986 delivered by Chief Judicial Magistrate, Solapur. Applicant is original accused No.1. Offences alleged are punishable under sections 409, 467, 468, 477A

read with 34 I.P.C.

2. Prosecution’s case is that a Coop.Society viz., Karmala Taluka Cooperative Shetkari Kharedi Vikri Sangh (for short "Sangh") has its branch at Jeur. The Dakshin Solapur Kharedi Vikri Sangh (for short "Solapur Sangh") is situated at Solapur. Accused No.1 is Manager of Sangh whereas Accused No.2 is the Managing Director of the said Sangh. Complainant was serving as a Special Auditor at the relevant time. Complainant carried out yearly audit of Sangh for the period commencing from 2nd April 1972 to 30th September 1976. Accused No.2 was working as the Managing Director. During the course of audit, Auditors raised some objections. It was revealed that there was a mis-appropriation to the tune of Rs.4,12,557.77. The period in this case is from 1974 to 1975. Present criminal case is restricted to the misappropriation of 4 and half tonnes of iron rods which are owned by the Sangh.

The said rods were at the godown of Sangh at Jeur. It is alleged that the applicant before me issued a letter in his capacity as Manager of the Sangh permitting Store Keeper to remove four and half tonnes of iron rods. The same was shown at the stage of removal as well in the stock register. However, the amount of sale proceeds are not credited in the cash book maintained at the Head Office of the Sangh. It is further case of the prosecution that the accused in collusion with each other disposed off the said iron bars by selling the same to Chaitanya Coop. Society, Solapur. They managed to get bogus receipt in the name of Bassappa Ramchandra Patil of Hotgi. Thus, a forged document was prepared with an intent to cheat the Sangh. When the complainant noticed this misappropriation, he reported matter to the police machinery.

3. On the basis of the complaint offence was registered and investigation was carried out.

During the course of investigation, police seized stock register maintained at Jeur branch, cash book maintained at head office of Sangh, receipts allegedly executed in the writing of accused No.2. The admitted signatures and writing of the Accused No.2 was referred for opinion of handwriting expert. It was reported by hand-writing experts that the hand writing of Accused No.2 on the admitted documents tallies with the hand-writing of disputed documents. During the course of investigation, statements of witnesses were recorded and at the conclusion thereof, charge sheet came to be filed against Accused Nos. 1 to 3 for the offences punishable under section 409, 467, 468, 477A read with 34 I.P.C.

4. Charges were framed for offences punishable under the abovementioned provisions and the same were amended subsequently on 24th May 1982. Amended charges were read over and

explained to the accused in Marathi and they pleaded not guilty to the same. Defence of Accused No.2 and 3 is of total denial. However, the present applicant (Accused No.1) stated that the Chairman of the Sangh Namdeorao Jagtap had called him and witness Kedar and gave them a letter stating that iron rod lying at Godown be unloaded for the construction work of Yashwantrao Chavan College, Karmala. According to accused No.1, the said Jagtap assured that payment of the rods would be made. Accordingly, at the time of stock verification, he had brought this fact to the notice of Chairman, Mr.Jagtap, Cashier of the Head Office and said Jagtap made payment of rods on 29th June 1974. According to Accused No.1 payment of iron bars was made under the machinery department vide Voucher No.482. The list of iron rods and tin sheets were shown. Stock worth Rs.14,000/- was disposed of. According to Accused, complainant lost sight of the fact that no objection was raised with regard to iron rods.

According to Accused No.1 after his transfer from office of Sangh, documents have been prepared in order to implicate him falsely. Said Mr.Jagtap in order to save himself has falsely implicated the present applicant by putting pressure on the Auditor. According to him, false case has been registered against him.

5. Learned Chief Judicial Magistrate before whom the trial commenced recorded the deposition of 10 witnesses examined by the prosecution. Several documents were taken on record. Learned Chief Judicial Magistrate heard the submissions of prosecution as well as accused and delivered the judgement and order of conviction and sentence. As far as applicant is concerned the conviction and sentence is in the following terms:-

> ". Accused No.1 Saiyyad Nadar Shaikh found guilty and convicted for the

offence punishable under section 409 of the Indian Penal Code, and he is sentenced to suffer R.I. for one year and to pay fine of Rs.1000/- in default accused to suffer R.I. for two months.

. Accused No.1 is acquitted for the offence punishable under section 467, 468 and 477(A) of I.P.C. and he is set at liberty for the said charge.

. Accused Nos. 2 and 3 are acquitted for the offences punishable under section 409, 467, 468, 477(A) of the I.P.C. and they are set at liberty."

6. Thus learned Magistrate held that the prosecution has proved that Accused Nos. 1 and 3 being public servants were entrusted with 4 and half tonnes (341 iron bars) which were stored in the godown of branch office of Sangh at Jeur and

they had dominion over the said property. However, learned Magistrate also held that the applicant is entitled to be acquitted for the offences allegedly punishable under sections 467, 468 and 477A of I.P.C. Accused Nos. 2 and 3 are acquitted of the offences punishable under section 409, 467, 468, 477A of I.P.C. The points which the learned Magistrate has framed at internal pages 6 and 7 of his Judgement and order read thus:-

> "2. Is it further proved by prosecution that accused No.1 to 3 in furtherance of their common intention managed to take possession of the said property entrusted to accused Nos. 1 and 3 and over which they have their dominion and transported it by truck number M.H.F. 7517 and delivered to Chaitanya Housing Society, Solapur with dishonest intention and thus committed criminal breach of

trust by dishonestly mis-appropriating the said property?

"3. Is it further proved by the prosecution that on the same day, date, time and place and in the course of same transaction, in furtherance of their common intention with intent to defraud Karmala Taluka Shetkari Kharedi Vikri Sangh and Chaitanya Housing Society Solapur, prepared false receipt dated 20/8/1974 purporting to be a receipt given by B.R.Patil of Hotgi, a fictitious person, showing the receipt of Rs.10,000/- of price of the bars, intending to use said forged documents for the purpose of cheating?

"4. Is it further proved by the prosecution that in the course of same transaction and in furtherance of common

intention accused Nos. 1 to 3 used said forged receipt having reason to believe to be forged, used the same as a genuine receipt with intent to cheat Karmala Taluka Shetkari Kharedi Vikri Sangh?"

7. Applicant being aggrieved and dis-satisfied with this judgement preferred an Appeal in the Court of Sessions Solapur being Criminal Appeal No.18 of 1995. Learned Sessions Judge Solapur by his judgement and order dated 17th February 1998 dismissed the appeal and confirmed the order of conviction and sentence of R.I. for one year and fine of Rs.1000 and in default to pay fine R.I. for two months imposed on applicant for offence punishable under section 409 of I.P.C.

8. Revisional jurisdiction of this Court has been invoked by the applicant to challenge the concurrent findings of the courts below.

9. Mr.Jamdar, learned Advocate appearing for applicant submits that the courts below have while convicting the applicant alone for the offence punishable under section 409 of I.P.C. committed grave error apparent on the face of record. In his submission, the orders of conviction and sentences as imposed suffer from a material irregularity resulting in manifest injustice. In his submission, the courts below fail to appreciate that the entire prosecution case is based upon the alleged removal and/or disposal of iron bars which were in the custody of applicant as a Manager of Union/Sangh. Thus, the entire basis of the charge is that iron rods entrusted to the applicant and over which he has dominion have been disposed of contrary to the mandate prescribed in section 409 of I.P.C. In such circumstances, the charge is proved and, therefore, the applicant is liable to be convicted and sentenced as above, is the

conclusion. However, if the prosecution case as set out in the judgement of the trial court is perused as a whole, it is apparent that the prosecution does not put in issue the alleged disposal of the goods at all. Prosecution goes ahead and alleges that the goods have been disposed off but the proceeds thereof have not been accounted for in the books of accounts and records maintained by the Sangh. Thus, there is apparent inconsistency in the manner in which the case has proceeded in the courts below. Once the entrustment and dominion over the goods is not an issue, then, the applicant should not have been convicted at all. In any event, once the prosecution itself alleges as above and material is produced to show that the amount indeed is brought in the account of Sangh and so reflected in the books as well, then it is not for the applicant accused to prove beyond reasonable doubt that the amount as received is nothing but the sale proceeds of the iron bars. Assuming

that, that is the case set up by the accused himself, yet a negative burden of this nature cannot be cast upon the applicant. If the applicant has put across a probable case, then, as is the settled principle, he is entitled to the benefit of doubt and consequent acquittal. Mr.Jamdar has taken me through the judgement of the courts below and points for determination framed so also conclusions recorded. He has taken me extensively through the findings insofar as charge is concerned. In his submission, once the accused are acquitted of the charge of forgery and the accused Nos. 2 and 3 are also acquitted of the charge of mis-appropriation, then it is clear that the applicant could not have been convicted. He submits that the burden could not have been thrown on the applicant once the delivery of iron bars is admitted. The entire approach of the courts below is, therefore, erroneous. He has also invited my attention to the cross examination of the

Auditor- original complainant in this behalf. He has invited my attention to the discussion by the trial court and the lower appellate court wherein a reference is made to the Voucher/receipt. Mr.Jamdar submits that the machinery account is common and there is no separate account for iron bars, admittedly. In such circumstances, according to him, the applicant was entitled to be acquitted atleast by giving him benefit of doubt and the judgement of the courts below cannot be sustained. According to him, this is a fit case where this Court should exercise its revisional jurisdiction and set right an obvious error.

10. In support of his submissions Mr.Jamdar has placed reliance upon the judgement in the case of reported in 1994 Cri.L.J. 1100 (Jagatnarayan Jha Vs. State of Bihar).

11. On the other hand Mr.Pednekar, A.P.P.

submits that the applicant cannot call upon this Court to re-appreciate and re-appraise the materials in its revisional jurisdiction. This Court is not a Court of further appeal. Even if this Court were to come to a different conclusion, it cannot interfere with the concurrent findings of fact which are binding. In any event, he submits that accused himself set up a case that the goods have been disposed off pursuant to the directions of Namdeo Jagtap and the amounts have been credited in the account of the Sangh. In such circumstances, the burden was rightly placed on the applicant to prove this fact. Applicant has not led any evidence in support or defence. Therefore, by merely referring to some stray admissions, he cannot bring home the fact of his innocence. He has failed to discharge the burden cast upon him. The judgement and order is based upon materials which have been produced and proved in accordance with law. If reliance is placed upon such

materials then, the judgements are not liable to be interfered with. Revision application be, therefore, dismissed.

12. With the assistance of learned Advocate appearing for both sides, I have perused the judgements rendered by the courts below, relevant statutory provisions and the decision relied upon by Mr.Jamdar.

13. A bare perusal of the prosecution case as set out and reflected from the record would reveal that the prosecution does not rest at the mere entrustment of the iron bars and their disposal contrary to any mandate or agreement. Prosecution itself goes ahead and alleges that the accused Nos. 1 to 3 in furtherance of their common intention managed to take possession of the property (iron bars) entrusted to them and over which they have dominion and transported by truck, number of which is specifically mentioned

and delivered it to Chaitanya Coop.Society, Solapur WITH DISHONEST INTENTION AND THUS COMMITTED CRIMINAL BREACH OF TRUST BY DISHONESTLY MISAPPROPRIATING THE PROPERTY. The Courts below specifically held that this charge is not proved. The next point which is based upon the prosecution story itself is that the accused prepared false receipts dated 20th August 1974 purported to be given by B.R.Patil of Hotgi, a vexatious person showing receipt of Rs.10,000/- i.e. the price of the iron bars. Thus, they intended to use forged documents for purpose of cheating. Once again it is pertinent to note that the Courts below held that this charge is not proved. Point No.4 framed by the trial court would also reveal that the same was based on the charge of forgery which charge is again held to be not proved. The courts below note admitted facts. Court below, thereafter, refer to the deposition of the material witnesses. The four and half tonnes of iron bard kept at Jeur,

according to prosecution, was removed at the instance of the accused No.1 - applicant before me. However, the courts below have also noted the fact that some of the witnesses have turned hostile and did not support the case of prosecution. In para 13 of the order of the trial court, the trial court refers to the charges which are levelled against the accused, the relevant statutory provisions and thereafter Judgement on the point is noted. While it is true that the iron bars were stocked at Jeur, however, in para 18 of the trial court's order it observes thus:-

> "18. .... Now, it is pertinent to note that it is a specific case of prosecution that as per letter issued by accused No.1, the stock of 4.1/2 tonnes of iron bars from Jeur branch was handed over in a truck bearing No.M.H.F. 7517. The prosecution has examined witnesses

Pandharinath Kedar at Exh.50 and witness Revansidha Jirage at Exh.62, who have specifically stated on oath that the accused No.1 Shaikh was present on 29/7/74 and 4.1/2 tones of iron bars were removed from Jeur branch. The prosecution in support of oral evidence of witness Kedar and Jirage has also relied on a chit issued by accused No.1 to reduce the stock of iron bars from Jeur and remove the same from Jeur branch office vide Exh.54 dated 29/7/74. On perusal of the chit Exh.54 dated 29.7.74, it is seen that it is signed by accused No.1 Shaikh. Besides that, it is also seen from the Chit Exh.54 that the signature of accused No.1 on the said chit and signatures of accused No.1 on the cash book articles Nos. 2 and 3 are the same and therefore there is a reason to believe much less there is sufficient

material on record to conclude that the letter or chit Exh.54 is in the handwriting of the accused No.1."

14. The trial court has, thereafter, referred to the documents viz., a letter, which is signed by the Chairman, Namdeo Jagtap, (Exh.55) and also the cross examination of witness Kedar. The trial court refers to the letter issued by the Chairman based upon which the bars were removed. It is clear that the iron bars were removed pursuant to some communication in writing. It is based upon the communication of the Chairman that the applicant is alleged to have executed a chit in his handwriting (Exh.54). In para 19 of the judgement, the trial court has observed that even if the stock of bars were removed from the godown as per the letter of Chairman, even then, the letter issued by the accused No.1 applicant being consistent with the letter of Chairman of Sangh, he being Manager had dominion over the iron bars

kept at the branch office and they were removed from godown at his instance. Thus, the prosecution proving dominion of the property successfully, all that needs to be seen is who is responsible for misappropriation of the said property. In that behalf, he has relied upon a statement of the applicant recorded under section 313 of Cr.P.C. The stock which was removed was sold and sale proceeds were also accounted for, is the case, according to courts below of the present applicant. That case according to courts below should be established and proved conclusively by the applicant.

15. In my view, there is substance in the contention of Mr.Jamdar that a burden of such a nature, cannot be placed, in the present facts and circumstances, on the applicant accused. His explanation in that respect has to be examined on the touch stone of pre-ponderance of probability and not required to be proved beyond reasonable

doubt. If his version is probable, then, it cannot be said that he is guilty of the charges levelled against him. In this context, Mr.Jamdar is right in placing reliance upon examination in chief of the Auditor so also his cross examination. In his cross examination, the Auditor admits that there was joint account of machinery, tin sheets and iron bars at the Union/Sangh. He has also referred to a transaction at page 66 of 45-G dated 29th June 1974 about credit of Rs.14,363.96 from Tin Sheets Head and Receipt No.482. However, he states that the receipt 482 has no concern with the present property of four and half tonnes of bars. Thus, the assertion is that payment and Receipt of Rs.14,000/- cannot be connected to disposal of the bars. It is on this basis that the courts below record that the prosecution has proved the case beyond reasonable doubt.

16. If as stated all through out the basis or

foundation of prosecution case is disposal of iron bars contrary to any permission or authority to do so, then, the moment letters, including that from the Chairman are admitted, the prosecution case cannot be believed in toto. Prosecution case at the most can be accepted to the extent that iron bars were entrusted to all the accused. The moment accused are acquitted of the charge of forgery and they could not be held guilty of forging documents to demonstrate disposal of the iron bars and credit of the proceeds pertaining thereto, then, to my mind, the applicant alone could not have been convicted of the charge under section 409 I.P.C. The trial court has very clearly held that, from the cash book which is produced by the prosecution, there is seen alleged payment of Rs.14000/- reflected therein. However, the prosecution did not produce Tin Sheet Register. Since, this register is not produced, production of cash book and the entry of Rs.14,000/- would not be enough

according to courts below to hold that the proceeds of iron bars have been duly accounted for. The discussion in that behalf in paras 25 and 26 of the trial court's judgement do not show that the applicant is guilty of offences punishable under section 409 I.P.C.

17. Even before the lower appellate court, it is pertinent to note that the same plea was raised. This is clear from the submission of applicant's Advocate, as noted in para 7 of trial court's order. Points for determination framed by the lower appellate court would also support my above conclusions. The lower appellate court concluded that the applicant is guilty of the charge of misappropriation because he had been entrusted with the iron bars and he has dishonestly disposed of the same and misappropriated the money.

18. To my mind, if the prosecution basing the

the charge of misappropriation on the removal of bars out of godown then, its own case gets falsified because of the removal/sale being admitted by it. Then, the further case is that the sale proceeds have not been accounted for and, therefore, the applicant is guilty. If the applicant is guilty only to the extent that removal of these iron bars but if it is under a writing which is signed by him and a letter of Chairman, then, how he could be held guilty of not accounting for sale proceeds, is not clear to me at all. Thus, an impossible burden of even the sale proceeds being fully accounted for is thrown upon the applicant and at the same time, the Managing Director has been acquitted by the courts below.

19. The findings in the judgement of the lower appellate court at para 13, would fully demonstrate that the prosecution is aware of the disposal and, therefore, the non accounting of

proceeds is further charge sought to be added. Even if it is permitted to be added and non accounting of proceeds could have been made subject matter of charge, yet, insofar as that aspect is concerned, unless it is demonstrated that the applicant was also responsible to account for them, prosecution could not have succeeded. That material, to my mind is lacking insofar as this applicant is concerned. Moreover, when the Managing Director is acquitted of the charge under section 409, then, it is not clear as to how applicant alone is liable to be convicted for the same.

20. Section 409 of I.P.C. deals with the criminal breach of trust by public servant or by Banker, merchant or agent. Thus, whoever being in any manner entrusted with property or with any dominion over the same in his capacity as a public servant, commits criminal breach of trust in respect of that property, he shall be punished

in accordance with the said provision. Criminal breach of trust is defined in section 405 to mean entrusted with property or with any dominion over the property and such property being dishonestly misappropriated or converted to his own use by that person or dishonestly using or disposing of that property in violation of any direction of law prescribing the mode for discharge of such trust or of any legal contract express or implied, which he has made touching the discharge of such trust, then, he commits criminal breach of trust. In the present case, the prosecution rested with dominion over the property but realising that the property has been disposed of, it sought to put in an issue of its disposal as being in violation of any authority or contract, express or implied. Even that could not be taken further because of the production of the letter of Chairman. Then, the case shifted on to the sale proceeds. If sale proceeds could be taken to be property, then it has to be shown that the

sale proceeds have been unaccounted for. That material being admittedly lacking, in my view, the courts below have committed an error apparent on the face of the record and the judgement and orders of conviction and sentence have resulted in manifest injustice. Consequently, the applicant is justified in invoking revisional jurisdiction of this Court.

21. This criminal revision application was admitted by this Court on 2nd September 1998 and not only there was an order staying sentence but this Court proceeded to suspend the conviction also. That order has been operating for the past more than 7 years. The applicant has retired from service on superannuation. In such circumstances, in my view, in the larger interest of justice the judgement and orders of the courts below be quashed and set aside.

20. In the result, revision succeeds. Rule

is made absolute in terms of prayer clause (b).

(S.C.Dharmadhikari, J)